IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 16, 2006 Session

STATE OF TENNESSEE v. FREDRICK ARNAZ MILLER

Appeal from the Criminal Court for Hamilton County
No. 243124 Douglas A. Meyer, Judge

No. E2005-01583-CCA-R3-CD - Filed September 14, 2006

The Defendant, Fredrick Arnaz Miller, was convicted by a Hamilton County jury of first degree murder, attempted first degree murder, and especially aggravated robbery. The Defendant was sentenced to life in prison for the murder conviction and, following a sentencing hearing, received sixty-year sentences for both the attempted first degree murder and especially aggravated robbery convictions. The sentences for first degree murder and attempted first degree murder were to be served consecutively, for an effective sentence of life plus sixty years. On appeal, the Defendant raises the following issues for our review: (1) whether the trial court erred in denying his motion to suppress statements made to the police; (2) whether the trial court erred by failing to redact a portion of the co-defendant's agreement with the State to testify against the Defendant; (3) whether the trial court abused its discretion by admitting into evidence a photograph of the Defendant; (4) whether the trial court erred by failing to grant the Defendant's motion for a mistrial or request for a curative instruction based upon remarks made by the trial judge before the jury; (5) whether the trial court erred in admitting hearsay statements of the accomplice; (6) whether the trial court erred by instructing the jury on flight; (7) whether consecutive sentencing was appropriate; (8) whether the trial court properly allowed a State witness to identify the Defendant's voice on the surveillance videotape; and (9) whether the evidence is sufficient to support his convictions. After review, we conclude that there is no reversible error and affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed; Remanded for Entry of Corrected Judgment

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Jeffrey S. Schaarschmidt, Chattanooga, Tennessee, for the appellant, Frederick A. Miller.

Paul G. Summers, Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Bill Cox, District Attorney General; and Rodney C. Strong, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On September 27, 1995, the victims, Thomas "Butch" Cripps and Christopher Calloway, were working at the Kwik-E Liquor Store on Rossville Boulevard in Chattanooga. The victim Cripps provided the following account of what transpired on this evening:

> At about ten minutes till eleven, this young black male came in, walked around the building. I asked if I could help him, he said he was looking, walked back to the cooler at the rear of the store, walked around, looked around, looking more at the cabinets and counter and purchased a small miniature or one-ounce bottle of Canadian Mist, and then walked out and walked back to the right of the store. And that's when I told Chris you know, 'That was just a little strange.'
>
> And about a minute and a half, two minutes later, another black male come [sic] in with a gun in his hand and a ski mask on and put his gun to the back of Chris's head, told -- took him to the end of the counter -- excuse me, took him to the end of the counter, made me walk backwards to him, brought us back up to the cash register, turned us both facing away from him, keeping his gun on us, took my gun from my waistband, demanded money. I gave him the money bag we kept under the register.
>
> He then walked us back to the end of the counter and around and told us both to lay down on the floor face down, which we did. He asked where the camera was, or where the recorder was. I told him it was in another room, and at which time he backed up and shot Chris in the back of the head. And I jumped up, and trying to defend myself, and he shot me twice while we fought out the front door, and then he ran off and I came back inside and called the police.

Meanwhile, Officers Scott Taylor and Joseph Brooks of the Chattanooga Police Department were on patrol on Rossville Boulevard in the area of Kwik-E Liquor Store. They observed a black male in the alley between "Walter A. Woods and the liquor store." Officer Taylor was suspicious because all businesses in the area were closed except the liquor store. The officers turned in between "Walter A. Woods and the little barber shop building." As they did so, "there was another car that came out of the bushes with its headlights on as soon as we turned in." The Officers activated their blue lights, and the vehicle, which was driven by Kevin Hinton, stopped. Hinton told the oficers he was having problems with his lights.

While the officers were questioning Hinton, shots "rang out" from the liquor store. At this time, Officer Brooks placed Hinton in the back of the patrol car. After surveying the area and following the arrival of "backup[,]" Officer Taylor went inside the liquor store and discovered that the perpetrator had already fled the scene.

The victim Calloway died as a result of his wounds. The victim Cripps was hospitalized for three days, and it took him several months to recover from his injuries.

Following interviews with the police, Hinton implicated the Defendant in the crimes. On February 12, 2003, a Hamilton County grand jury returned a six-count indictment against the Defendant, charging him with first degree premeditated murder, first degree felony murder, attempted first degree murder, aggravated assault, and two counts of especially aggravated robbery.

Pursuant to an agreement with the State, Hinton testified against the Defendant at trial and provided the following version of events. Hinton testified that "a few weeks before" September 27th, he was staying with Mr. Gary Fitch and Ms. Yarshaunajania Threatt at a residence on Taylor Street. Hinton introduced the Defendant, as Darius Jones, to Mr. Fitch and Ms. Threatt. According to Hinton, on September 27th, he, Mr. Fitch, and the Defendant were in the front yard of the residence on Taylor Street. The men discussed that they "need to go get some cheese," meaning they needed money and were going to rob someone. Mr. Fitch chose not join Hinton and the Defendant. Hinton testified that he and the Defendant left the residence in Hinton's white Bonneville, looking for a place to rob. The Defendant decided on the Kwik-E Liquor Store. Hinton went into the liquor store first to see how many individuals were inside the store and, while inside, he purchased a bottle of Canadian Mist. He then returned to the vehicle and reported to the Defendant. The Defendant, who was armed and wearing a ski-mask and a "blue-and-black or a blue-and-purple coat[,]" got out of the car and went inside the liquor store.

Hinton testified that the Defendant phoned him "two or three hours later" and told him "to stay right there, he would be over there in a minute." Upon his arrival, the Defendant asked "what happened . . . do they know who did it, and [Hinton] told him no." The Defendant told Hinton not to worry because there was only "circumstantial evidence." Hinton stated that the Defendant then went out of town for about three weeks.

The State called several witnesses to corroborate Hinton's testimony. The victim Cripps identified Hinton as the first man to enter the liquor store who purchased the bottle of Canadian Mist. He was unable to identify the shooter; however, he described the assailant as "approximately five-foot-ten, five-eleven, roughly 135, 145 pounds, had on a blue ski mask, more turquoise blue, dark pants and a shirt. . . . African American." Officer Taylor testified regarding his detention of Hinton in the nearby parking lot and his observations upon entering the liquor store following the robbery and murder.

Ms. Threatt testified that Hinton began staying at her house in the summer of 1995 and, at some point, the Defendant began staying there too. On the day of the robbery and murder, Ms. Threatt overheard Hinton and the Defendant talking about "they need some money." According to Ms. Threatt, the Defendant and Hinton left the residence in Hinton's car. She stated that after that evening, she did not see the Defendant again for "a couple of weeks or a month later." In the presence of the jury, Ms. Threatt viewed the video surveillance tape that had recorded the robbery and murder. She testified that she recognized the Defendant's voice from the videotape. Ms. Threatt

could not identify the jacket worn by the assailant on the videotape, but she opined that the jacket "looked like the jacket [the Defendant] had."

Mr. Fitch testified that he lived with Ms. Threatt on Taylor Street in 1995. According to Mr. Fitch, the Defendant and Hinton "would come around every other day, every couple of days. . . . They both would stay off and on a couple nights a week maybe." He also recounted the conversation between him, the Defendant, and Hinton about going to "get some cheese." Mr. Fitch stated that following the evening in question, the Defendant "stopped coming by" for "a couple of weeks[.]" When the Defendant returned, he said "he'd been out of town with his family." The Defendant also told Mr. Fitch that "[w]henever Kevin was drinking, he would talk too much." In December of 1995, Mr. Fitch overhead the Defendant state that he was going to kill Hinton. Mr. Fitch also overheard a conversation between the Defendant and Hinton about burning a jacket.

Officer Charles Russell of the Chattanooga Police Department testified concerning several statements made by the Defendant, who was transferred in January of 1996 from the Hamilton County Jail to the Police Services Center and asked to give a statement. The Defendant declined to give a statement, but several statements made by him during the initial phase of the interview were admitted into evidence. On cross-examination, Officer Russell testified that during the search for the perpetrator immediately following the robbery and murder, officers apprehended a man named "James Burkes" in a nearby area of town, and he was initially a suspect in these crimes. According to Officer Russell, James had on dark pants and brown boots, which matched the description given by Officer Taylor of the individual he observed in the alleyway by Kwik-E Liquor Store prior to the robbery and murder.

The Defendant did not testify on his own behalf. He did offer an expert witness who testified to the poor quality of the surveillance videotape. The Defendant also called Officer Brooks. Officer Brooks testified that after taking Hinton to the Police Services Center for questioning following the robbery and murder, Hinton asked "if James was here also[.]"

Following the conclusion of proof, the jury found the Defendant guilty as charged and imposed a punishment of life imprisonment for the murder conviction. On September 29, 2004, a sentencing hearing was held, and the trial court sentenced the Defendant to sixty years for both the especially aggravated robbery conviction and the attempted first degree murder conviction.[1] The sixty-year sentences were to be served concurrently with one another but consecutively to the life sentence, resulting in an effective sentence of life plus sixty years. The effective sentence was also to be served consecutively to a prior sentence for escape. Following denial of his motion for new trial, the Defendant timely appealed to this Court.

[1]The felony murder conviction was merged with the premeditated murder conviction. The two convictions for especially aggravated robbery were merged together, and the conviction for aggravated assault was merged with the attempted first degree murder conviction.

ANALYSIS

I. Motion to Suppress

First, the Defendant argues that the trial court erred by denying his motion to suppress statements made to Officer Russell on January 11, 1996 during the initial interview process. On this date, the Defendant was transferred from the Hamilton County Jail to the Police Services Center for questioning regarding the robbery of Kwik-E Liquor Store and the murder of Christopher Calloway. After the Defendant's arrival at the Police Services Center, officers arranged for the Defendant to be placed in a room with Hinton for approximately fifteen minutes. The Defendant was unaware that this conversation was being videotaped. The State did not attempt to introduce this videotape at trial.

Following the staged encounter with Hinton, the Defendant was taken to Officer Russell's office. Officer Russell prepared a report detailing this meeting, wherein he provided the following facts:

> I spoke briefly with [the Defendant] to obtain his date of birth, social security number, height, and weight. I explained to [the Defendant] that he had been indicated as the person who shot and killed Mr. Christopher Call[o]way during the robbery of the Kwik-E Liquor Store. [The Defendant] told me that he did not know anything about the murder and robbery. [The Defendant] ask[ed] me if Mr. Hinton had told me that he [the Defendant] did the murder and I advised him that he had. [The Defendant's] response was to tell me that Mr. Hinton was a drunk and liar. [The Defendant] advised that Kevin talked too much and stayed drunk all the time. [The Defendant] then indicated that he did not wish to make any statements concerning this investigation and the interview was concluded. [The Defendant] was transported back to the Hamilton County Jail and no charges were filed.

At the motion to suppress hearing, Officer Russell testified that it was his "standard practice of trying to tell somebody if they're a suspect why they're in here and why I'm speaking with them and to give them some information as to . . . what led to their being there . . . so they can make an informed decision whether to talk to me or not." On cross-examination, Officer Russell was asked: "[D]id you look at him and say, We know you did this killing?" Officer Russell responded: "I don't recall if I made that statement. I'm not saying -- I may, I may have. I don't recall it, making that statement. . . . It is possible, but I don't recall saying that." According to Officer Russell, he had not begun questioning the Defendant about the robbery when the Defendant made these remarks; the Defendant "volunteered it." Officer Russell confirmed that Miranda warnings had not been administered to the Defendant since his arrival at the Police Services Center.

The Defendant testified to the following version of events:

> I think [Officer Russell] started off asking me about tattoos, goatee, my hair, then told me that I killed somebody and showed me a picture of a person in a ski mask, telling me that I killed somebody. I ain't killed no one. Then did -- me just

> being in a room with Kevin, then I asked him did Kevin say that. . . . To the best of my recollection, first thing he said about it was, You killed a man.

According to the Defendant, Officer Russell stated that the Defendant had killed someone and showed him a photograph. The Defendant then asked Officer Russell: "Did Kevin Hinton tell you that [I] killed somebody?" The Defendant acknowledged he told Officer Russell that "Mr. Hinton was a drunk and liar" but denied that he said, "Kevin talked too much and drunk -- stayed drunk all the time[.]" The Defendant admitted that these remarks were not made in response to questioning by Officer Russell and that he "volunteered" them.

The Defendant contends that these statements were the result of custodial interrogation, or its functional equivalent, without the benefit of warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). The State concedes that the Defendant was in custody and had not yet been given Miranda warnings but maintains that the statement was voluntary and not made in response to police interrogation.

The right against self-incrimination is protected both by the United States Constitution, Article V, and the Tennessee Constitution, article I, section 9. To help insure the protections of the Fifth Amendment in the criminal process, the United States Supreme Court held in Miranda v. Arizona that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444. Statements made during custodial interrogation without the benefit of Miranda warnings are inadmissible in court. Dickerson v. United States, 530 U.S. 428, 432 (2000). Miranda warnings are required only when the defendant is in custody and is subjected to questioning or its functional equivalent. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). In Innis, the Supreme Court elaborated on "interrogation" for Miranda purposes:

> "[I]nterrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Id. at 301-02 (footnotes omitted). However, "where a defendant makes a statement without being questioned or pressured by a government agent, the statement is admissible, if the statement was freely and voluntarily made by the defendant." State v. Land, 34 S.W.3d 516, 525 (Tenn. Crim. App. 2000) (citations omitted).

In State v. Sawyer, our supreme court affirmed suppression of the defendant's statement, finding that the reading of the specifics of the affidavit was likely to elicit a response and that the defendant had been placed "in an environment in which he could reasonably believe he was to be interrogated." 156 S.W.3d 531, 535 (Tenn. 2005). In Sawyer, an aggravated sexual battery case, the defendant was handcuffed and taken into a detective's office where he was read the detailed allegations in the affidavit in support of the arrest warrant. Id. at 532. The defendant responded by admitting to rubbing the victim's leg but denied vaginal contact as alleged in the affidavit. Id. at 533.

At this juncture, it is necessary to note that the trial court overruled the motion to suppress the statements but made no findings of fact on the issue. Given the different versions relayed by Officer Russell and the Defendant at the suppression hearing, findings of fact are imperative to the issue of whether the Defendant was placed "in an environment in which he could reasonably believe he was to be interrogated." Sawyer, 156 S.W.3d at 535. This precludes any meaningful appellate review and would ordinarily require a remand for findings. See State v. Chearis, 995 S.W.2d 641, 645 (Tenn. Crim. App. 1999).

Regardless, the testimony from Officer Russell about the Defendant's remarks revealed no prejudicial information. The same information was presented to the jury during the testimony of Mr. Fitch. At trial, Mr. Fitch testified that the Defendant "stopped coming by" around the "first or toward the middle of October." The Defendant returned "a couple of weeks later" looking for Hinton. According to Mr. Fitch, the Defendant stated, "Kevin, when he drinking, he start talking too much." On cross-examination, Mr. Fitch testified that Hinton was "a heavy drinker[,]" that he drank daily, and that he talked a lot when he drank. Essentially, Mr. Fitch testified to the same remarks by the Defendant as did Officer Russell. Thus, Officer Russell's testimony was cumulative regarding these statements. Moreover, there was substantial proof of guilt in this case. If the trial court erred in failing to suppress these statements, such error would have been harmless. Id. (citing Tenn. R. App. P. 36(b)).

II. Letter of Agreement

The Defendant next argues that the trial court erred by admitting into evidence a portion of the Letter of Agreement (Exhibit 1) between the State and Hinton. The Letter of Agreement secured Hinton's testimony against the Defendant at trial and provides in pertinent part as follows:

> The State and Hinton agree that Hinton's life is in danger so long as he is incarcerated in the same facility as [the Defendant]. Hinton and the State agree that he shall be incarcerated in a different facility than where [the Defendant] is housed,

> awaiting trial. The parties envision that, but this agreement does not mandate housing at CCA Silverdale Workhouse.

The Defendant specifically objects to the admission of the first sentence of this paragraph.[2]

In its order denying the Defendant's motion for new trial, the trial court concluded that it erred in admitting the statement and, even if admission was proper, the "omission of a limiting instruction was erroneous under Rules 802, 803(3), and 404(a)(1)." We agree that this evidence was irrelevant and improperly admitted because Hinton's fear of the Defendant had no connection to the murder or robbery in this case. Tenn. R. Evid. 401, 402. There was no evidence presented or claim made about Hinton's conduct that would make his state of mind as reflected by the Letter of Agreement relevant to an issue at trial. See State v. Leming, 3 S.W.3d 7, 18 (1998); see also Tenn. R. Evid. 803(3). Moreover, even if relevant, the statement was unduly prejudicial and constituted improper character evidence. Tenn. R. Evid. 403, 404.

However, the trial court found that the error was harmless, reasoning:

> First, the statement was not the only proof of Mr. Hinton's fear of retaliation. It was cumulative to his trial testimony. Second, the statement only weakly suggests that the defendant is violent. From his trial testimony, it was apparent that Mr. Hinton did not have any particular reason to fear retaliation from the defendant and that the basis for any fear of retaliation against Mr. Hinton on anyone's part was conjectural. That is, it was apparent that Mr. Hinton's fear did not prove the defendant's guilt so much as the defendant's guilt would be the measure of the reasonableness of Mr. Hinton's fear. Third, the assumptive nature of the statement and its consequent lack of assertive value were apparent. Fourth, the illogic of interpreting the statement as the state's assertion regarding its own state of mind was apparent. Finally, presumably, the state did not suggest to the jury that the statement was proof of any issue other than Mr. Hinton's credibility.

For these reasons and in light of the significant proof of guilt, we agree with the trial court that admission of the challenged portion of the Letter of Agreement did not affect the results of the trial and was clearly harmless. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

III. Photograph

The Defendant argues that the trial court violated the Tennessee Rules of Evidence by permitting the introduction of a photograph "of the defendant in green Army fatigues and a black toboggan" at trial. He argues that the photograph (Exhibit 9) is more prejudicial than probative. Tennessee courts follow a policy of liberality in the admission of photographs in both civil and

[2] Following the appointment of new counsel subsequent to the trial, the Defendant challenged the admission of the entire Letter of Agreement at the motion for new trial. The trial court correctly found that a challenge to the entire Letter of Agreement was waived for failure to make a contemporaneous objection during trial.

criminal cases. State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978) (citations omitted). Accordingly, "'the admissibility of photographs lies with the discretion of the trial court'" whose ruling "'will not be overturned on appeal except upon a clear showing of an abuse of discretion.'" State v. Faulkner, 154 S.W.3d 48, 67 (Tenn. 2005) (quoting Banks, 564 S.W.2d at 949). However, before a photograph may be entered into evidence, it must be relevant to an issue that the jury must decide, and the probative value of the photograph must outweigh any prejudicial effect that it may have upon the trier of fact. State v. Vann, 976 S.W.2d 93, 102 (Tenn. 1998); State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App. 1993) (citation omitted); see also Tenn. R. Evid. 401, 403.

The challenged photographic exhibit depicts the Defendant in a black toboggan hat and a green shirt. The background of the photograph is a wall; but the photograph is not a mugshot. The Defendant contends:

> First, the relevance is questionable. The defendant is not wearing the jacket, which concerned so much of the testimony during trial. Two, the photo is irrelevant to prove the jacket belonged to the defendant. Because the judge didn't think it was the same person, it appears to be a [sic] little value for identification purposes. Furthermore, video store surveillance tape, which we presume is to use in comparison to the photo, is admittedly a poor quality. Therefore, a photograph that doesn't resemble the [defendant] is admitted to compare to an image of a person whose face is obscured by a ski-mask on a "snowy" and "grainy" tape.

The Defendant contends that the photograph was unduly prejudicial due to the fact that the "dress of the defendant in the photograph is reminiscent of 'gangster rap' music culture." The State argues that the photograph is relevant to show the Defendant's appearance in 1995, as the case was being tried almost nine years later in 2004.

We agree with the State this exhibit was relevant and, thus, admissible for the purpose of showing what the Defendant looked like in 1995. The Defendant's appearance had changed over the course of nine years. The trial court noted: "Well, just my opinion, I wouldn't even say it was the same person. Just -- I don't even think it looks like him right now." The Defendant clearly placed his identity as the perpetrator of the offenses at issue during the trial. "When a defendant's physical appearance has changed, it is permissible to show the witness a photograph of the defendant at the time the offenses were committed." Milburn L. Edwards v. State, No. M2002-02124-CCA-R3-PC, 2003 WL 23014683, at *15 (Tenn. Crim. App., Nashville, Dec. 15, 2003) (citing Cross v. State, 540 S.W.2d 289, 290 (Tenn. Crim. App. 1976)). Moreover, the Defendant's argument that "the photograph is reminiscent of 'gangster rap' music culture" and implies that the crime was gang-related is not supported by a review of the photograph or other evidence. Accordingly, we conclude that its admission into evidence was not error.

IV. Trial Judge's Remarks

The Defendant next contends that a mistrial, or at a minimum a curative instruction, should have been granted due to remarks made by the trial judge directed at the Defendant's attorney. Specifically, he contends that:

> The admonition amounted to the assertion that defense counsel, unhappy with the witness's response, was playing sort of word games that lawyers are often so loathed for playing. This admonition served to build distrust in the minds of the jury and served to take some of the burden off the State by casting defense counsel in an unfavorable light and making not only the [Defendant], but his counsel, suspect.

During defense counsel's cross-examination of State's witness, Kevin Hinton, the following colloquy occurred:

> Q. Okay. Do you recall telling that after you bought the bottle, that when you got in your car and you drove off, that you drove through the back of the building and you saw an individual walking? Do you recall making that statement?
>
> A. No, I don't recall driving through the back.
>
> Q. That's not what I asked, Mr. Hinton. I asked if you recall telling the police you saw --
>
> THE COURT: Now, wait a minute . . . . You've gotta give him a fair break. You've put words into his mouth. Do not do that.
>
> [DEFENSE COUNSEL]: Your Honor, I'm asking about the statement he -- a prior statement he made.
>
> THE COURT: All right. Ask him, but do not change his answer to suit you and then turn it around and ask him.
>
> Q. (By defense counsel) Mr. Hinton, when you were apprehended by police that night and taken to the police station, do you recall giving them a statement?
>
> A. Yes. I recall giving them a statement.
>
> Q. Okay. And do you recall telling them that you drove through the back alley and saw an individual walking in the alley?
>
> A. Yes.

Q. You do recall that. Okay. And then that individual you stopped and talked to?

A. Yes.

Q. Okay. And that you told police -- is it correct that you told police that that individual asked you for a cigarette or a light?

A. Yes.

Q. Okay. And that was your statement to the police that night?

A. Yes.

Q. Okay. But today that's, that's not your testimony; is it?

A. No.

Defense counsel continued in his cross-examination of Hinton. The following morning counsel requested a mistrial or a special curative instruction based upon the trial judge's comments. The State argued that the pattern instruction on statements and rulings of the court[3] was sufficient to cure any prejudice. The trial court denied the motion. In reviewing this matter following the Defendant's motion for new trial, the trial court concluded: "As is now apparent from the trial transcript, there was, after all, no reason for the Court to admonish counsel as it did. Counsel asked whether the witness recalled 'telling' and the witness answered that he did not recall 'driving.'"

The decision of whether to grant a mistrial is within the sound discretion of the trial court. State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). This Court will not disturb that decision absent a finding of an abuse of discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990). "Generally a mistrial will be declared in a criminal case only when there is a 'manifest necessity' requiring such action by the trial judge." State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). In determining whether there is a "manifest necessity" for a mistrial, "'no abstract formula should be mechanically applied and all circumstances should be taken into account.'" State v. Mounce, 859 S.W.2d 319, 322 (Tenn. 1993) (quoting Jones v.

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[3]The trial court gave the following pattern instruction:

> At times during the trial, I've ruled upon the admissibility of evidence. You must not concern yourself with these rulings. Neither by such ruling, these instructions nor any other remarks which I have made do I mean to indicate any opinion as to the facts or as to what your verdict should be.

7 Tennessee Practice, Tennessee Pattern Jury Instructions -- Criminal 1.06 (7th ed. 2002).

State, 403 S.W.2d 750, 753 (Tenn. 1966)).

We decline to hold that the trial judge's remarks rose to the level of prejudice resulting in a "manifest necessity" for a mistrial. However, the Defendant also requested a special curative instruction. In its order on the Defendant's motion for new trial, the trial court found, "[T]he Court agrees with the defendant that the admonition and refusal to give a special curative instruction were erroneous." The trial court apparently concluded that a curative instruction should have been given at the time of the improper comments and that the pattern instruction given at the beginning and end of trial was insufficient to remedy the error.

Judges in Tennessee are prohibited by our state constitution from commenting upon the evidence during trial. Tenn. Const. art. VI, § 9. "In all cases the trial judge must be very careful not to give the jury any impression as to his feelings or to make any statement which might reflect upon the weight or credibility of evidence or which might sway the jury." State v. Suttles, 767 S.W.2d 403, 406-07 (Tenn. 1989). In other words, a trial judge should be very careful not to express any thought that would lead the jury to infer that his or her opinion was in favor of or against the defendant. State v. Harris, 839 S.W.2d 54, 66 (Tenn. 1992).

In determining that the error was harmless, the trial court stated:

> For several reasons, however, the Court decides that its errors in this respect were harmless. First, the non-responsive nature of the witness's answer and therefore the unreasonableness of the Court's admonition were apparent. Second, the admonition did not cause counsel to abandon his immediate object in asking the question. Counsel merely rephrased the question. Third, almost immediately after the admonition, counsel justified the question by exposing the inconsistency. Fourth, eventually, in response to a question regarding another matter, counsel obtained a concession from the witness that he had lied to the police. Thus, if counsel did suffer any loss of credibility as a result of the erroneous admonition, it was minimal and temporary.

We agree. Additionally, we note that the initial and concluding instructions given by the trial court were thorough and clear, and the jury is presumed to follow the instructions of the court. State v. Butler, 880 S.W.2d 395, 399 (Tenn. Crim. App. 1994). Given the relative strength of the State's case, we conclude that any allegedly improper comments by the trial judge would not have prejudiced the Defendant. See Tenn. R. App. P. 36(b); Tenn. R.Crim. P. 52(a).

V. Hearsay

As his next assignment of error, the Defendant contends that the trial court erred in allowing State's witness Gary Fitch to testify about what Kevin Hinton said after the crimes under review were committed. Specifically, Mr. Fitch testified as follows:

Q. (By the State) Mr. Fitch, after Kevin Hinton came by with the car with the fingerprint dust on it, did Mr. Hinton talk to you over a period of time about the events that happened?

A. Yes.

Q. Did he talk to you about an event that happened at the robbery of the store where the man died at the liquor store?

A. Yes. Yes.

Q. And did Kevin Hinton tell you who he was with when that happened?

A. Yeah, Darius.

Q. Huh?

A. He said Darius.

Q. Darius Jones?

A. Yes.

Q. And did he tell you who went inside and did the shooting?

. . . .

A. He said Darius.

. . . .

Q. (By the State) He said Darius Jones?

A. Yes.

The trial court ruled that the statements were admissible because they were not offered for the truth of the matter asserted but to corroborate Hinton's testimony. The Defendant argues that there is "no exception . . . to allow otherwise inadmissible testimony merely because it is needed to corroborate the accomplish [sic] testimony." The State argues that the trial court's ruling was correct.

Tennessee Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the

matter asserted." Tenn. R. Evid. 801(c). Generally, "[h]earsay is not admissible except as provided by these rules or otherwise by law." Tenn. R. Evid. 802.

Ordinarily, prior consistent statements of a witness are not admissible to bolster the witness' credibility. State v. Braggs, 604 S.W.2d 883, 885 (Tenn. Crim. App. 1980).

> [P]rior consistent statements may be admissible, as an exception to the rule against hearsay, to rehabilitate a witness when insinuations of recent fabrication have been made, or when deliberate falsehood has been implied. But before prior consistent statements become admissible, the witness' testimony must have been assailed or seriously questioned to the extent that the witness' credibility needs shoring up.

State v. Benton, 759 S.W.2d 427, 433-34 (Tenn. Crim. App. 1988). Before prior consistent statements may be admissible, the witness' testimony must have been assailed or attacked to the extent that the witness' testimony needs rehabilitating. Id. at 434. A prior consistent statement admitted to rehabilitate the witness is not hearsay because it is not offered "to prove the truth of the matter asserted in the statement." Neil P. Cohen et al., Tennessee Law of Evidence § 8.01[9] (5th ed. 2005).

In this case, the defense repeatedly attacked Hinton's testimony, insinuating that Hinton was fabricating his testimony to secure his deal with the State and that someone else, "James," was the perpetrator of these crimes. See State v. Inlow, 52 S.W.3d 101, 106-07 (Tenn. Crim. App. 2000). Mr. Fitch's testimony did rehabilitate Hinton's credibility by showing that Hinton implicated the Defendant as the assailant prior to any motivation he had to lie. See State v. Livingston, 907 S.W.2d 392, 398 (Tenn. 1995). However, the Defendant correctly points out that Mr. Fitch testified before Hinton; thus, admission of the statements was premature. However, any error in untimely admission is harmless because the testimony became admissible following Hinton's testimony. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a).

VI. Flight Instruction

The Defendant contends that the trial court's use of a Tennessee Pattern Jury Instruction on flight was unwarranted by the evidence. Specifically, the Defendant argues that the instruction was erroneous because "no other evidence exist[ed] to support [such an instruction] other than the defendant left the scene." The State argues that the Defendant has waived review of this issue for failing to raise a contemporaneous objection. However, immediately before the charge was read to the jury, counsel for the Defendant stated: "And just, Your Honor, for the record, I would object to flight." The State responded:

> Well, I think the evidence is clear that there was flight, he fled the scene, and there's actual testimony he left the jurisdiction for at least a couple weeks after this event happened before he came back into town, so there's clear evidence of flight by

> him, and there's flight obviously on the video, the assailant flees the store as he's shooting Butch Cripps.

The trial court ruled, "All right. I will give flight." Accordingly, we disagree that the issue is waived. In the alternative, the State asserts that the instruction was proper.

The trial court has a duty "to give a complete charge of the law applicable to the facts of a case." State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986); see also Tenn. R. Crim. P. 30. Following the presentation of the evidence, the trial court gave the jury the following instruction regarding flight:

> The flight of a person accused of a crime is a circumstance which, when considered with all the facts in the case, may justify an inference of guilt. Flight is the voluntary withdrawal of one's self for the purpose of evading arrest or prosecution for the crime charged.
>
> Whether the evidence presented proves beyond a reasonable doubt that the defendant fled is a question for your determination. The law makes no nice or refined distinction as to the manner or method of flight. It may be open or it may be a hurried or a concealed departure, or it may be a concealment within the jurisdiction.
>
> It takes both a leaving the scene of the difficulty and a subsequent hiding out, evasion or concealment in the community or leaving of the community for parts unknown to constitute flight.
>
> If flight is proved, the fact of flight alone does not allow you to find the defendant guilty of the crime alleged. However, since flight may be -- by a defendant may be cause for -- may be caused by a consciousness of guilt, you may consider the fact of flight if flight is so proven, together with all the other evidence, when you decide the guilt or innocence of the defendant.
>
> On the other hand, an entirely innocent person may take flight and such flight may be explained by proof offered or by the facts and circumstances of the case.
>
> Whether there was flight by the defendant, the reasons for it and the weight to be given to it are questions for you to determine.

See 7 Tennessee Practice, Tennessee Pattern Jury Instructions -- Criminal 42.18 (7th ed. 2002). This pattern jury instruction is a correct statement of the applicable law and has been previously cited with approval by our court. See, e.g., State v. Kendricks, 947 S.W.2d 875, 885-86 (Tenn. Crim. App. 1996); State v. Terry Dean Sneed, No. 03C01-9702-CR-00076, 1998 WL 783330, at *7-8 (Tenn. Crim. App., Knoxville, Nov. 5, 1998). In order for a trial court to charge the jury on flight as an inference of guilt, there must be sufficient evidence to support such instruction. State v. Berry, 141

S.W.3d 549, 588 (Tenn. 2004). Sufficient evidence supporting such instruction requires "'both a leaving the scene of the difficulty and a subsequent hiding out, evasion, or concealment in the community.'" State v. Burns, 979 S.W.2d 276, 289-90 (Tenn. 1998) (quoting State v. Payton, 782 S.W.2d 490, 498 (Tenn. Crim. App. 1989)). Our supreme court has held that "[a] flight instruction is not prohibited when there are multiple motives for flight" and that "[a] defendant's specific intent for fleeing a scene is a jury question." Berry, 141 S.W.3d at 588.

In this case, the Defendant ran from the liquor store following commission of the robbery and murder. There was testimony from the State's witnesses that following the evening in question, the Defendant left town for several weeks. In our view, the evidence at trial established both a "leaving the scene" and a "hiding out" sufficient to warrant an instruction on flight. In consequence, the trial court did not err by providing the instruction.

VII. Consecutive Sentencing

The Defendant contends that the trial court erred in ordering the sentences for first degree murder and attempted first degree murder to be served consecutively to one another.[4] The sentence for first degree murder and the effective sixty-year sentence for attempted first degree murder and especially aggravated robbery were to be served consecutively, for an effective sentence of life plus sixty years. Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider: (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. See Tenn. Code Ann. § 40-35-210(b);[5] State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001).

Upon a challenge to the sentence imposed, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. See Tenn. Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If our review reflects that

[4] The Defendant does not challenge that his effective sentence must be served consecutively to his prior sentence for escape. Consecutive sentencing is mandated pursuant to Tennessee Code Annotated section 39-16-605.

[5] We note that the legislature has recently amended several provisions of the Criminal Sentencing Reform Act of 1989, said changes becoming effective June 7, 2005. However, the Defendant's crimes in this case, as well as his sentencing, predate the effective date of these amendments. Therefore, this case is not affected by the 2005 amendments, and the statutes cited in this opinion are those that were in effect at the time the instant crimes were committed.

the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. See State v. Fletcher, 805 S.W. 2d 785, 789 (Tenn. Crim. App. 1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act, and (2) the trial court's findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001).

Tennessee Code Annotated section 40-35-115(b) provides that it is within the trial court's discretion to impose consecutive sentencing if it finds by a preponderance of the evidence that any one of the following criteria applies:

> (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b). These criteria are stated in the alternative; therefore, only one need exist to support the imposition of consecutive sentencing. In State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), the supreme court imposed two additional requirements for consecutive sentencing when the "dangerous offender" category is used: The court must find consecutive

sentences are reasonably related to the severity of the offenses committed and are necessary to protect the public from further criminal conduct. Wilkerson, 905 S.W.2d at 937-38.

The Defendant argues, and the State concedes, that the trial court did not make the requisite findings in imposing consecutive sentencing. Nonetheless, we conclude that the Defendant's prior criminal history constituted a sufficient basis to sentence him consecutively. Tenn. Code Ann. § 40-35-115(b)(2). The Defendant's criminal history includes convictions for attempted first degree murder, especially aggravated robbery, two counts of aggravated robbery, and felonious escape, as well as numerous juvenile adjudications beginning at age twelve. The only hiatus in the Defendant's criminal history is when he was incarcerated prior to his escape in 1995. Accordingly, we affirm the trial court's imposition of consecutive sentencing.

VIII. Voice Identification

As to the issue of voice identification, the Defendant argues that the testimony of Yarshaunajania Threatt, who identified the Defendant's voice from the surveillance videotape, should have been inadmissible because the State failed to comply with Rule 12(d)(2) of the Tennessee Rules of Criminal Procedure. Specifically, he contends the State did not disclose during discovery or its notice of intention to use evidence that it intended to used the videotape for voice identification purposes. He states:

> In this case, the only evidence that put the [Defendant] inside the liquor store was the voice identification. This identification was made using a copy of a nine-year-old tape. The defense managed, on short notice, to find an expert witness to testify to the of [sic] effects overuse of the tape on the quality of the audiotape. While this expert provided some understanding of the facts, his testimony served to highlight the defense's need for an expert that could testify specifically as to sound quality, and the probability that is the degree of distortion that would affect a person's ability to reliably identify a voice on the tape.

The State argues that the Defendant was provided a copy of the tape and "should have known that the State might use voice identification."

The Defendant filed his Rule 12(d)(2) motion on March 16, 2004. On April 13, 2004, the State responded to the Defendant's motion on the record. At this time, the State informed the Defendant: "[T]here was a, a store surveillance videotape that recorded these events, or that also includes some audio on it, that would be used." At trial, the State asserted that defense counsel "has had a copy of the videotape for quite awhile with the audio on it."

It appears from the record that Threatt was not shown the surveillance videotape and asked to identify the voice on the tape until May 22, 2004. The Defendant filed a motion to suppress this identification on May 24, 2004, one day before trial was to begin. At no time on the record did defense request a continuance; counsel only requested suppression of the voice identification.

Rule 12(d)(2), Tennessee Rules of Criminal Procedure, requires that upon a defendant's request, the State will provide the defendant notice of its "intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16." Tenn. R. Crim. P. 12(d)(2). The purpose of Rule 12(d)(2) is to afford the accused an opportunity to suppress any evidence that (a) the State intends to use in its case-in-chief and (b) is discoverable pursuant to Rule 16. The rule contemplates that the State will provide the defendant with specific information concerning the evidence the State intends to introduce. State v. Louis Francis Gainnini, No. 36, 1991 WL 99536, at *4 (Tenn. Crim. App., Jackson, June 12, 1991).

However, no violation of the Rules of Criminal Procedure occurred because the State was not aware of the voice identification until May 22nd. See State v. Hutchinson, 898 S.W.2d 161, 167-68 (Tenn. 1994); State v. Harris, 30 S.W.3d 345, 349 (Tenn. Crim. App. 1999). The State promptly informed defense counsel upon discovery of this additional evidence. See Tenn. R. Crim. P. 16(c).

Moreover, when there has been a failure to produce discoverable material within the allotted time, the trial judge has the discretion to fashion an appropriate remedy; whether the defendant has been prejudiced by the failure to disclose is always a significant factor. See State v. Baker, 751 S.W.2d 154, 160 (Tenn. Crim. App. 1987). Generally speaking, the exclusion of the evidence is a drastic remedy and should not be implemented unless there is no other reasonable alternative. See, e.g., State v. House, 743 S.W.2d 141, 147 (Tenn. 1987). Additionally, a defendant must demonstrate actual prejudice from the State's failure to provide evidence pursuant to a discovery request. State v. Garland, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981); State v. Briley, 619 S.W.2d 149, 152 (Tenn. Crim. App. 1981). In considering discovery violations, the important inquiry is what prejudice has resulted from the discovery violation, not simply the prejudicial effect the evidence, otherwise admissible, has on the issue of a defendant's guilt. See, e.g., State v. Cottrell, 868 S.W.2d 673, 677 (Tenn. Crim. App. 1992); Garland, 617 S.W.2d at 186.

There was no request for a continuance. The Defendant did have an expert testify at trial as to the poor quality of the videotape. The Defendant has not provided even a suggestion as to how the poor quality of the videotape would affect a person's ability to identify the voice on the videotape, other than the fact that the tape is of poor quality. The Defendant had a copy of the videotape "for quite awhile[.]" Threatt testified that she knew the Defendant and was familiar with his voice. "For authentication purposes, voice identification by a witness need not be certain; it is sufficient if the witness thinks he can identify the voice and express his opinion." Stroup v. State, 552 S.W.2d 418, 420 (Tenn. Crim. App. 1977). Here, we cannot conclude that the trial court abused its discretion by admitting the evidence. This issue is without merit.

IX. Sufficiency

As his final issue, the Defendant challenges the sufficiency of the evidence. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is

insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

The Defendant was convicted of first degree murder, attempted first degree murder, and especially aggravated robbery. First degree murder is defined as the "premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1). A premeditated killing is one "done after the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-202(d). To be premeditated, the intent to kill must have been formed before the act itself, and the accused must be sufficiently free from excitement and passion. Id. An intentional act requires that the person have the desire to engage in the conduct. See id. § 39-11-106(a)(18). Whether premeditation is present is a question of fact for the jury, and it may be determined from the circumstances surrounding the offense. Bland, 958 S.W.2d at 660; State v. Anderson, 835 S.W.2d 600, 605 (Tenn. Crim. App. 1992). A person commits criminal attempt who, "acting with the kind of culpability otherwise required for the offense . . . [a]cts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part. . . . " Tenn. Code Ann. § 39-12-101(a)(2). Robbery is the "intentional or knowing theft of property from the person of another by violence or putting the person in fear." Id. § 39-13-401(a). Especially aggravated robbery is a robbery accomplished with a deadly weapon and where the victim suffers serious bodily injury. Id. § 39-13-403(a).

It is well settled that, "[i]n Tennessee, a conviction may not be based solely upon the uncorroborated testimony of an accomplice." State v. Shaw, 37 S.W.3d 900, 903 (Tenn. 2001) (citing State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994)). This "very salutary rule" is designed to prevent the "obvious dangers" of allowing a defendant to be convicted solely on the basis of an accomplice's testimony. Sherrill v. State, 321 S.W.2d 811, 814 (Tenn. 1959). However, Tennessee

law requires only a modicum of evidence in order to sufficiently corroborate the testimony of an accomplice. State v. Copeland, 677 S.W.2d 471, 475 (Tenn. Crim. App. 1984).

With respect to the nature, quality, and sufficiency of the evidence necessary to corroborate an accomplice's testimony, this Court has held:

> The rule of corroboration as applied and used in this State is that there must be some evidence independent of the testimony of the accomplice. The corroborating evidence must connect, or tend to connect the defendant with the commission of the crime charged; and, furthermore, the tendency of the corroborative evidence to connect the defendant must be independent of any testimony of the accomplice. The corroborative evidence must of its own force, independently of the accomplice's testimony, tend to connect the defendant with the commission of the crime.
>
> . . . .
>
> The evidence corroborating the testimony of an accomplice may consist of direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. The quantum of evidence necessary to corroborate an accomplice's testimony is not required to be sufficient enough to support the accused's conviction independent of the accomplices testimony nor is it required to extend to every portion of the accomplice's testimony. To the contrary, only slight circumstances are required to corroborate an accomplice's testimony. The corroborating evidence is sufficient if it connects the accused with the crime in question.

State v. Griffis, 964 S.W.2d 577, 588-89 (Tenn. Crim. App. 1997) (citations omitted).

The proof necessary to corroborate the accomplice's testimony must include "'some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity.'" Shaw, 37 S.W.3d at 903 (quoting Bigbee, 885 S.W.2d at 803). In other words, the corroboration must include some fact establishing the identity of the defendant as a criminal actor. Boxley, 76 S.W.3d at 387. It is generally for the trier of fact to determine whether sufficient corroboration exists. Id. (citing Shaw, 37 S.W.3d at 903). However, as this Court has previously pointed out, "'[e]vidence which merely casts a suspicion on the accused . . . is inadequate to corroborate an accomplice's testimony.'" Id. (quoting Griffis, 964 S.W.2d at 589).

The evidence in the light most favorable to the State established that on September 27, 1995, the Defendant discussed going to "get some cheese" with Kevin Hinton. The two left the residence together in Hinton's vehicle and went to the Kwik-E Liquor Store in Chattanooga. Hinton went into the store first to see how may individuals were present; he purchased a bottle of Canadian Mist, left

the store, returned to the vehicle, and reported to the Defendant. Two employees were present in the store, the victims Cripps and Calloway. The Defendant, armed and wearing a ski-mask, entered the liquor store demanding money. The victim Cripps produced the "money bag" that was kept under the counter and gave it to the Defendant. The Defendant ordered the two men to lay face down on the floor, asked where the camera was located, and then shot the victim Calloway in the back of the head. The victim Cripps fought with the Defendant, and Cripps was shot twice during this altercation. The Defendant ran from the store.

During this time, Hinton was being questioned by police officers in a nearby parking lot, where he had parked the vehicle. Hinton testified that he was involved in the robbery along with the Defendant. The victim Cripps was able to identify Hinton as the first man to enter the liquor store. Ms. Threatt overhead the conversation between Hinton, Mr. Fitch, and the Defendant about needing some money; Ms. Threatt saw Hinton and the Defendant leave together in Hinton's car on the evening of the robbery and murder; and she identified the Defendant's voice from the video surveillance tape. Ms. Threatt opined that the jacket worn by the perpetrator on the surveillance videotape "looked like the jacket [the Defendant] had." Mr. Fitch testified to the conversation about needing money and that the Defendant stated he was going to kill Hinton several months after the robbery and murder. Further, the Defendant left town for a period of time after September 27th. This evidence is sufficient corroboration that the Defendant was the perpetrator of these crimes. While we have found several errors in the trial court's rulings, these errors have been deemed harmless, and we conclude that the evidence is sufficient to support the Defendant's convictions for first degree murder, attempted first degree murder, and especially aggravated robbery beyond a reasonable doubt.

While this issue has not been raised by the Defendant, we note that the judgment form for attempted first degree murder provides for an improper release eligibility date. On the judgment form, the boxes marked "Career 60%" and "Violent 100%" are both checked. Attempted first degree murder is not enumerated as a violent offense requiring service at 100%. See Tenn. Code Ann. § 40-35-501. The judgment form for especially aggravated robbery only reflects that it is to be served consecutively to the escape sentence and makes no mention of the manner of service as to the life sentence or attempted first degree murder sentence. Nonetheless, it is apparent from the sentencing hearing that the trial court intended the attempted first degree murder sentence and especially aggravated robbery sentence to be served concurrently with one another and consecutively to the life sentence. The attempted first degree murder judgment form reflects consecutive service to the life sentence. Especially aggravated robbery is an enumerated violent offense under Tennessee Code Annotated section 40-35-501. Therefore, regardless of the error in the judgment form, service of his sentence remains at 100% for the sixty-year sentence. Nevertheless, we remand this case to the trial court for entry of a corrected judgment.

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CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court. This matter is remanded to the trial court for entry of a corrected judgment regarding the manner of service of the sentence for especially aggravated robbery.

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DAVID H. WELLES, JUDGE